Supreme Court, U.S.
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No. 95-1027

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Robert S. Mirin,
Petitioner, Pro Se,

v.

Paul Eyerly, III, and
Press-Enterprise Newspaper,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Should the Court grant certiorari to hear this action as a matter of sound judicial administration, when it is duplicative of an appeal involving the same parties and issues now pending in the United States Court of Appeals for the Third Circuit?

II. If sanctions proceedings are exempt from the automatic stay provision of the Bankruptcy Code, pursuant to 11 U.S.C. § 362(b)(4), then was Mr. Mirin's Petition for a Writ of Certiorari timely filed with this Court?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Press-Enterprise, Inc., and Paul Eyerly, III (hereinafter jointly referred to as "Press-Enterprise"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the orders and judgment of the United States Court of

Appeals for the Third Circuit.[1] The orders at issue are the April 27, 1995 Order denying petitioner's motion to substitute himself as the sole appellant and the April 27, 1995 Order dismissing the Boykins' appeal for lack of jurisdiction. Petitioner's request for rehearing en banc on these orders was denied on June 2, 1995.

COUNTERSTATEMENT OF THE CASE

This petition arises from an attorney's "willful bad faith" conduct in having pursued and maintained clearly time-barred state law claims and frivolous civil rights claims against a newspaper and its publisher. See January 19, 1995 Order, Appendix to Petition for Writ of Cert. at B1-60. Petitioner, Robert S. Mirin, Esquire, the attorney in question, was sanctioned pursuant to 28 U.S.C. § 1927 for continuing to press the aforementioned claims after they had been adjudicated and dismissed by a district court judge.[2] The particular questions at issue in this Petition are the direct result of Mr. Mirin's failure to properly appeal from the trial judge's sanctions order.

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1. In accord with Supreme Court Rule 29.1, the Press-Enterprise, Inc. hereby discloses that it does not have any parent or subsidiary companies.

2. The factual and legal bases for the sanctions are set forth in the district court's order of January 19, 1995, which is attached as an appendix to Mr. Mirin's petition at B1-60. The order accurately captures the trial court proceedings, as well as the nature of petitioner's misconduct.

A. Trial Court Proceedings

Michael Boykin, an employee of Bloomsburg University of Pennsylvania, was arrested and charged with the rape of another Bloomsburg University employee. Following his acquittal at trial of these charges, Mr. Boykin and his family brought suit against a number of state and county officials, alleging violations of the federal civil rights laws and pendent state law claims.[3] The Boykins asserted similar claims against respondents the Press-Enterprise and its publisher, Paul Eyerly, III. Petitioner represented the Boykins in this litigation.

On May 17, 1994, the trial court granted respondents' motion to dismiss the Boykins' claims pursuant to Fed. R. Civ. P. 12(b)(6). The district court found that the Boykins' civil rights claims against respondents were "devoid of merit." The court also held that their common law defamation and invasion of privacy claims were time-barred, and that they "failed to meet the most basic pleading requirements." See Order of May 17, 1995; Order of January 19, 1995 at B13.

Undeterred by the trial court's dismissal of the Boykins' claims against respondents, Attorney Mirin continued to pursue identical claims against identical

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3. The Complaint charged violations of 42 U.S.C. §§ 1981, 1983, 1985, and 1986, as well as conspiracy to violate these sections. The Complaint further alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as well as state law claims of defamation, invasion of privacy, abuse of process, and others.

parties in another federal action, which had been removed from state court. Refusing to abide by the District Court's earlier dismissal of these claims, and intent on maintaining his client's claims against these media defendants, Attorney Mirin's conduct necessitated the filing of a second Rule 12(b)(6) motion and the continued participation of the Press-Enterprise in the action. After the two federal actions were consolidated, the second motion to dismiss was deemed moot.

Respondents then moved for sanctions under 28 U.S.C. § 1927 and the court's inherent power to sanction. After briefing and a seven day evidentiary hearing on the sanctions motion, the trial court granted the motion, made a clear, factual finding of bad faith, and imposed a sanction of fees and expenses against petitioner alone. Id. at B60-61.

B. Proceedings in the Third Circuit

On February 16, 1995, the Boykins (the clients against whom no sanctions were imposed) filed an appeal of the sanctions order with the United States Court of Appeals for the Third Circuit. The Notice of Appeal contained the Boykins' names only.[4] Petitioner

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4. Below is the body of Notice of Appeal in its entirety:

> Notice is hereby given that Plaintiffs, Michael R. Boykin & Margaret L. Boykin, in the above named case, hereby appeal to the United States Court of Appeals for the Third Circuit from the final judgement [sic] from an order imposing sanctions for attorney's fees on plaintiffs' counsel Robert S. Mirin, Esquire, entered on the nineteenth day of January,

Mirin was listed only as counsel for the appellants. On February 23, 1995, the Third Circuit Clerk issued a letter to all counsel which read, in relevant part, as follows:

> This will advise you that the within appeal will be submitted to a panel of this Court for possible dismissal due to a **jurisdictional defect.**
>
> It appears that this Court lacks jurisdiction for the reason that Appellants lack standing to appeal district court order. See Bartels v. Sports Arena Employees Local, 838 F.2d 101 (3rd Cir. 1988) (Plaintiffs have no standing to appeal from a district court order imposing sanctions on plaintiffs' attorney personally).
>
> The Court **DIRECTS** that all parties respond **IN WRITING** (**original and three copies** with a certificate of service). The responses are to be **RECEIVED** in the Clerk's Office not later than **3/6/95**. The responses may be in either pleading or informal letter form.

1995.

Notice of Appeal, dated Feb. 13, 1995, at D1. The trial court's sanctions order of January 19, 1995, was attached to the Notice as an exhibit.

The Press-Enterprise filed a response within the time period prescribed by the Circuit Court; petitioner filed no response for the Boykins. Instead, almost three weeks later, on March 24, 1995, well after the 30 day appeal period had run, Mr. Mirin moved to substitute himself as the sole appellant, arguing that the omission of his name from the notice of appeal was "technical" and that dismissal "would constitute an excessive sanction and would preclude a fair decision on the merits." See Motion for Substitution at E1-2. Petitioner filed a brief in support of the motion on April 5, 1995. See also Brief in Support of Motion to Substitute at F1-5.

Having previously referred the issue of the Boykins' standing to a jurisdictional panel, the Third Circuit referred petitioner's motion for substitution to the same panel for review. The panel first denied petitioner's motion to substitute himself for the Boykins,[5] and then, the panel dismissed the Boykins' appeal for lack of standing on April 27, 1995. See April 27, 1995 Order at A1.

Mr. Mirin, who earlier ignored the Court of Appeals' directive to respond to a possible jurisdictional defect, then petitioned the Circuit Court for rehearing en banc on May 11, 1995. On May 23, 1995, before the Court of Appeals ruled on his rehearing petition, Mr. Mirin filed for bankruptcy with the United States Bankruptcy Court for the Middle District of Pennsylvania

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5. See Order of April 13, 1995, at G1 (referring motion to panel); Order of April 27, 1995, at H1-2 (denying motion substitute) Circuit Judges Becker, Hutchinson, and Alito reviewed the motion.

in order to avoid having to pay the sanctions imposed or posting a supersedeas bond.[6] See Petition for Writ of Cert. at 10.

While the Third Circuit contended with the appeal of the sanctions order, plaintiffs' action against the remaining civil rights defendants continued to progress through the district court. On July 7, 1995, the District Court granted motions for summary judgment in favor of the remaining defendants to the litigation and entered a final judgment against the plaintiffs on July 21, 1995. An appeal from the trial court's final order was filed on August 7, 1995, identifying both petitioner and

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6. Mr. Mirin filed for bankruptcy, despite representing to the district court on February 27, 1995, that a "supersedeas bond is unnecessary in this case because no doubt exists that Plaintiffs' counsel would be able to satisfy the judgement [sic] if an appeal is unsuccessful . . ." and that "plaintiffs' counsel has sufficient financial means to satisfy the judgment should he be unsuccessful in his appeal." See Plaintiffs' Counsel's Amended Motion for Waiver of Supersedeas Bond at ¶ 3, ¶ 5, filed in M.D. Pa., Civil Action No. 4:CV-94-306. Attorney Mirin also filed an affidavit explicitly representing to the court that:

> I have the personal financial resources to satisfy the full judgment for sanctions in the event I am unsuccessful in my appeal(s) of the order for sanctions. . . .
>
> As a practicing attorney for 27 years and officer of the court, I guarantee my ability to satisfy the judgment without the requirement of posting formal bond in this matter.

See Affidavit of Robert S. Mirin, dated Feb. 27, 1995, filed in M.D. Pa., Civil Action No. 4:CV-94-306.

the Boykins as appellants. See Notice of Appeal, attached hereto as a supplement to the Appendix at J1. Additionally, in a statement of the issues filed with the Third Circuit on October 5, 1995, petitioner stated that he was appealing the imposition of sanctions that had been the subject of his clients' earlier appeal. See Statement of the Issues at ¶¶ 3 and 4, attached hereto as a supplement to the Appendix at K1.

In compliance with the rules of this Court, if the Boykins (or their counsel) intended to petition for review of the Third Circuit's order denying the motion to substitute or the dismissal order, they would have been required to file a petition for writ of certiorari by August 31, 1995 -- 90 days after the Third Circuit's June 2, 1995 denial of rehearing. See Supreme Court Rule 13.4 (requiring that a petition for a writ be filed within ninety days after the denial of rehearing). On August 25, 1995, towards the end of this appeal period, Mr. Mirin petitioned the Court for a 90-day extension of the certiorari period. See Application for Extension of Time, attached hereto as a supplement to the Appendix at L1-4. At the time, petitioner represented that he was seeking relief from the automatic stay provisions of the Bankruptcy Code, in order to continue to pursue his appeal against the Press Enterprise. See id. at L2-3. He followed this request for an extension with a second request, filed on August 29, 1995, wherein he represented that relief from the automatic stay had been granted by the Bankruptcy Court on August 28, 1995.

Mr. Mirin made these requests of the Court without revealing the existence of the second appeal to the Third Circuit -- one that properly identified him as

a party to the appeal. Indeed, petitioner has never informed this Court of his prosecution of a second appeal on the same sanctions issues. This appeal is now pending in the Third Circuit, and the petitioner herein is an appellant in that appeal. See Boykin v. Bloomsburg Univ., 3d Cir., No. 95-7456.

The Honorable Justice David Souter denied Mr. Mirin's application for an extension of time to file his petition. Thus, Mr. Mirin would have been required to file any petition for writ of certiorari seeking review of the Third Circuit's orders by August 31, 1995. See Aug. 31, 1995 Letter from William K. Suter, Clerk. See also Supreme Court Rule 13.4 (requiring that a petition for a writ be filed within ninety days after the denial of rehearing). Ignoring Justice Souter's denial of his application for an extension, Mr. Mirin filed his petition for certiorari on October 26, 1995. Petitioner's pattern of ignoring the rules, engaged in before the District Court and the Third Circuit, has continued in this Court.

Additionally, the first version of his petition was overlength, and was filed with a motion for leave to file a document in excess of thirty pages, in contravention of Supreme Court Rule 33. On November 7, 1995, Justice Souter denied this motion. On November 8, 1995, the Court directed Mr. Mirin to file a petition within sixty days that conformed with the Court's rules. A revised petition was finally docketed on December 27, 1995.

SUMMARY OF THE ARGUMENT

The Petition should be denied for at least two reasons.

First, the Petition is the by-product of a duplicative appeal of the trial court's imposition of sanctions against Mr. Mirin. The issues presently before this Court are occasioned only by petitioner's failure to properly prosecute an appeal and his clients' lack of standing. A second appeal -- which concerns the same issues and parties and which was commenced by a notice of appeal that properly identified petitioner and his clients as appellants -- is presently pending in the Third Circuit. Because the federal courts have required dismissal of duplicative appeals and because under the circumstances review of the issues raised in the petition would be a waste of judicial resources, the petition should be denied.

Second, Mr. Mirin's petition should be dismissed or denied because the petition was filed out of time, some two months after the period for petitioning for certiorari had run. Contrary to petitioner's arguments, the certiorari period was not tolled by his bankruptcy, as litigation involving attorney sanctions imposed by the federal judiciary under their regulatory power is exempt from the automatic stay provisions of the Bankruptcy Code, pursuant to 11 U.S.C. § 362(b)(4). Petitioner's attempt to convince yet one more court to ignore his

continuing abuse of the judicial system should be soundly rebuked.[7]

REASONS FOR DENYING THE PETITION

A. Certiorari Should Be Denied For Reasons of Wise Judicial Administration.

The petition for certiorari should be denied for reasons of wise judicial administration. Mr. Mirin's appeal to this Court's discretionary review authority is the by-product of duplicative litigation. What began as an ill-considered appeal of the trial court's sanctions order -- which is now one of the subjects of a second appeal presently pending in the Third Circuit involving the same parties -- has become a vehicle for maintaining two appeals against the respondents. Because petitioner can obtain review of the sanctions entered against him on a full record before the Third Circuit in this second

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7. Petitioner also relies upon a conflict in the circuits in the interpretation of Fed. R. App. P. 3(c) as a basis for this Court's assuming jurisdiction. It may well be that at some point in the future, the Court will have to determine how Rule 3(c) should be applied when a lawyer, through inadvertence or otherwise, seeks to appeal the imposition of sanctions through the fiction of appealing the order through his clients. It is respectfully suggested, however, that given 1) the state of the record, 2) Petitioner's failure to address the jurisdictional issue when requested to do so by the Third Circuit, and 3) the law as it has developed to date, that review is best reserved for some future time, when the litigation is not duplicative, and when it is raised in a manner consistent with this Court's procedures.

action, it is a waste of judicial resources for this Court to decide whether Federal Rule of Appellate Procedure 3(c) compelled the lower court to grant petitioner's motion for substitution.

As a general matter, this Court has held that, in the interests of wise judicial administration, duplicative litigation within the system of federal courts is to be avoided. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952); Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936). Following this guidance, the lower federal courts have not hesitated to dismiss duplicative appeals when no good purpose is served by having more than one action continue. See, e.g., Crowley Cutlery Co. v. United States, 849 F.2d 273, 279 (7th Cir. 1988) ("[T]he question whether a litigant should be able to litigate the same issue at the same time in more than one federal court is an easy one -- he should not be"); Remington Rand Corp. v. Business Sys., Inc., 830 F.2d 1274, 1276 (3d Cir. 1987) ("[A]s a general principle, duplicative litigation in the federal court system is to be avoided").

This matter is duplicative of a second appeal concerning the same sanctions issues already pending in the Third Circuit. The minor differences between the two actions are solely the result of petitioner's failure to effectively prosecute the first appeal and his clients' lack of standing. As noted earlier, the Boykins filed this appeal after the trial judge imposed sanctions on Mr. Mirin for bad faith conduct and for abuse of the court system. The sanctions order was thus appealed by parties without standing to raise the issue.

Knowing that the Boykins lacked standing, petitioner filed a new appeal with the Third Circuit that included a second appeal of the sanctions order. Unlike the defective notice of appeal at issue here, the second notice correctly named both petitioner and the Boykins as appellants.

Under these circumstances, granting Supreme Court review of petitioner's challenge to the Third Circuit's dismissal of the initial appeal would contravene principles of wise judicial administration. Now that a proper notice has been filed, the Court of Appeals can review the sanctions entered against Mr. Mirin, absent any additional problems with his appeal. Because Mirin has no legitimate reason to continue proceedings in this Court, the decisions cited above make clear that his petition should be dismissed.

B. The Petition for Writ of Certiorari Was Filed Out of Time, and Should Be Dismissed.

Because Mr. Mirin's petition for certiorari was filed out of time, the Court may dismiss the petition or deny it. See, e.g., Philbrook v. Glodgett, 421 U.S. 707, 721 (1975) (failure to follow Court rules can justify dismissal of action).

Pursuant to Supreme Court Rule 13.1, a petition for a writ of certiorari to review a judgment entered by a court of appeals must be filed with the Supreme Court Clerk's Office within 90 days from date the judgment was entered. If a petition for rehearing was filed with the appellate court, however, a petition for writ of certiorari

need not be filed until 90 days after the denial of the petition for rehearing. See Supreme Court Rule 13.4.

Here, the orders of the Third Circuit on which the petitioner seeks review were entered on April 27, 1995. See Orders of April 27, 1995, at A1 and H1-2. A petition for rehearing on these determinations subsequently was denied by the Third Circuit on June 2, 1995. Thus, if the Boykins or Mr. Mirin sought to file a petition for writ of certiorari, then it should have been filed by August 31, 1995, 90 days after denial of the petition for rehearing. Rather than comply with the Court's rules, Mr. Mirin failed to file a petition with the Court until October 26, 1995 -- almost five months after entry of the denial for rehearing.

To excuse his delay, petitioner contends that because he filed for bankruptcy on May 23, 1995, the Third Circuit was precluded by the automatic stay provision of the Bankruptcy Code from ruling on the petition for rehearing until after the stay was lifted. Thus, he contends the stay tolled the applicable time period for the filing of any certiorari petition with this Court. These arguments are without merit because petitioner's bankruptcy did not stay the sanctions litigation.

Although section 362(a) of the Bankruptcy Code mandates that the filing of a bankruptcy petition operates as an automatic stay, there are certain exceptions to this provision. See 11 U.S.C. § 362(a) (automatic stay provision); 11 U.S.C. § 362(b) (exceptions). One of these exceptions is stated in section 362(b)(4), which permits an exception for "the

commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." See id. at § 362(b)(4). The section has been held to exempt proceedings concerning the imposition of sanctions from the automatic stay provision, regardless of whether the sanction imposed by the court was a payment of an opponent's fees or costs.[8] See Alpern v. Lieb, 11 F.3d 689, 690 (7th Cir. 1993) (proceeding by private litigant to impose sanctions under Federal Rule 11 exempt from bankruptcy stay under § 362(b)(4), as "Rule 11 sanction is meted out by a governmental unit, the court, though typically sought by a private individual or organization--a nongovernmental litigant"); O'Brien v. Fischel, 74 B.R. 546, 550, 16 Bankr. Ct. Dec. 470 (D. Hawaii 1987) (holding that "imposition of sanctions under Rule 11 is a direct application of the district court's regulatory powers, which serve to protect the general public from needless, harassing, and abusive litigation"; therefore, proceedings imposing sanction under Rule 11 not stayed by bankruptcy petition).[9] See also Papadakis v. Zelis, 230 Cal. App.3d 1385, 1389, 282 Cal. Rptr. 18 (Cal. App., 1st Dist. 1991) (court imposed sanctions against debtor payable to respondents, holding automatic stay

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8. None of the cases cited by petitioner have anything to do with the imposition of sanctions, nor do any of the cases cited by petitioner involve the application of the automatic stay provision to proceedings involving attorney discipline or misconduct. See Petition for Writ of Cert. at 12-13.

9. But see Brandt v. Schal Assoc., Inc., 131 F.R.D. 512, 514 (N.D. Ill. 1990) (court found reasoning in O'Brien regarding exemption from stay to be unpersuasive).

provision never intended to be "escape mechanism" from courts inherent regulatory power over abuses of court system by attorneys).

Accordingly, sanctions proceedings, even when commenced by private litigants under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927, fall under the court's regulatory or police powers as a governmental unit. See, e.g., Alpern, 11 F.3d 689; O'Brien, 74 B.R. 546. As the Alpern court has observed, such proceedings are not designed merely for fee-shifting, but to impose:

> sanctions for unprofessional conduct in litigation, and while the form of sanction is often and was here an order to pay attorney's fees to the opponent in litigation, it is still a sanction, . . . even when it directs that payment be made to a private person rather than to the government. . . . The private enforcer, sometimes called a 'private attorney general,' can be viewed as an agent of the 'governmental unit,' the federal judiciary, that promulgated Rule 11 in order to punish unprofessional behavior. The fact that a sanction is entirely pecuniary does not take it out of section 362(b)(4).

Alpern, 11 F.3d at 690. Thus, a "litigant should not be allowed to delay the imposition of sanctions indefinitely by the expedient of declaring bankruptcy" (id.), which is exactly what petitioner has done here. See Petition for Writ of Cert. at 10.

The respondents have suffered through what amounts to Mr. Mirin's intentional disregard of the district court's orders and his willful blindness to the procedural and substantive rules governing appeals. Petitioner has continued his abusive and expensive tactics by pursuing this duplicative litigation, and now he asks this Court to accommodate him further by allowing him this breach of the rules. The fairest response to Mr. Mirin's record of dilatory conduct would be the dismissal of this petition and the imposition of further sanctions for pursuing a frivolous Petition without advising the court of the pendency of an appeal that will provide the petitioner and his clients with a full appellate review.

Citizens exposed to our nation's legal system, such as respondents herein, should not be made to suffer the expense of continued litigation, appeals, writs, motions and more motions simply because an attorney is involved as a litigant. Accordingly, respondents would urge this Honorable Court to invoke Rule 8.2 of the Rules of the Supreme Court and, after notice and opportunity to show cause, impose appropriate sanctions upon Attorney Mirin.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Counsel for Respondents

Supplemental Appendix
J1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

MICHAEL R. BOYKIN,	:	
MARGRET L. BOYKIN,	:	
AND AARON M. BOYKIN, and	:	
ROBERT S. MIRIN, ESQUIRE	:	
Plaintiffs	:	District Court
	:	No. 4:CV-94-306
v.	:	
	:	
BLOOMSBURG UNIVERSITY,	:	
et al.	:	
Defendants	:	

NOTICE OF APPEAL

Notice is hereby given that Michael Boykin, Margret Boykin, Aaron Boykin and Robert S. Mirin, Plaintiffs, hereby appeal to the United States Court of Appeals for the Third Circuit from the Judgment entered in this matter by the United States District Court for the Middle District of Pennsylvania on the 21st day of July, 1995, entering judgment pursuant to the Orders of July 7, 1995, in favor of Defendants and

against Plaintiffs. This Order has been entered in the docket as evidenced by the attached copy.

Respectfully submitted

MIRIN & JACOBSON

DATED: August 7, 1995

By: /s/

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17111-5260
(717) 561-1515

Robert S. Mirin
Attorney ID # 25305
Attorney for Plaintiff

Supplemental Appendix
K1

ISSUES

1. Was dismissal of Defendants, Press Enterprise and Paul Eyerly, III, premature or, in the alternative, should they have been reinstated once discovery established a substantial number of newspaper articles, original and republished, falling within one year of statute of limitations.

2. Was the dismissal of Press Enterprise premature in view of the nature of Plaintiffs' legal theory and need for discovery relating to the operation and related matters of the newspaper.

3. Was the imposition for sanctions under 28 U.S.C. §1927 improper where any "duplicativeness" was the product of legal actions in state court by a third party defendants removing a state court matter to federal court and where the removed complaint was virtually identical to the federal complaint, thereby facially imposing no additional burden upon Defendants Press Enterprise and Paul Eyerly, III, and requiring no additional work by Defendant, Press Enterprise, Inc. or Paul Eyerly, III.

4. Was the imposition of sanctions factually and legally supported in the record as a whole.

Supplemental Appendix
K2

5. Was the grant of summary judgment on the substantive claims under §§1981, 1983, 1985, 1986 and Title VII as to the remaining Defendants correct as a matter of fact and law where the record reflects substantial supported differences as to material facts.

6. Was the District Court Judge's refusal to recuse himself correct as a matter of fact and law.

Supplemental Appendix
L1

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ROBERT S. MIRIN,
Petitioner

PAUL EYERLY, III, and
PRESS ENTERPRISE NEWSPAPER,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI BASED ON TOLLING OF A 90 DAY PERIOD

Robert S. Mirin, Esq.
Pro Se Petitioner
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Harrisburg, PA 17111-5260

Supplemental Appendix
L2

The order sought to be reviewed was rendered by the United States Court of Appeals for the Third Circuit on April 27, 1995. A request for a rehearing was denied on June 2, 1995. This Court has jurisdiction to review the Third Circuit judgment by writ or certiorari pursuant to 28 U.S.C. §1254.

This motion is lodged with the court pursuant to Rule 13.6 of the Supreme Court Rules. The putative petition for certiorari arises from a jurisdictionally based refusal of the United States Court of Appeals for the Third Circuit to entertain an appeal from the imposition of sanctions in a civil rights case at the district court level. On May 23, 1995, as a consequence of the imposition of sanctions, counsel invoked the protection of the bankruptcy court at 1-95-01003. 11 U.S.C. §362.[1] A request for relief from the automatic stay under the bankruptcy code is pending at this time. On June 2, 1995, the Third Circuit denied the previously filed request for rehearing from the April 27, 1995, order of the "jurisdictional panel" again declining the appeal.

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1. U.S.C. §362 states, in pertinent part, that "a petition filed under . . . this title . . . operates as a stay, applicable to all entities, of -- (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title[.]"

While counsel believes that the stay tolls the period for the filing of a petition for certiorari under the provisions of the bankruptcy code at 11 U.S.C. §108[2]; under all the circumstances counsel is moving under the rules of this Court for an order affirming the procedures to be followed as to the due date for the petition for certiorari.

It is counsel's position that a portion of the period for filing of certiorari is tolled by §108 of the bankruptcy code. Counsel reads the bankruptcy stay as tolling the period subsequent to the May 23, 1995 filing in bankruptcy court to date and continuing until the stay is lifted. Thus, only the period between April 27, 1995, and May 23, 1995, - 25 days - ran against the 90 day certiorari filing period. On this basis, counsel computes the final due date for any petition seeking certiorari to be due no late than 65 days from the issuance of relief from the automatic stay (i.e. the balance of the ninety days, adjusted for the period between April 27 and May 23, 1995).[3] In

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2. 11 U.S.C. §108 states, in pertinent part, that "if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period does not expire until . . . 30 days after notice of the termination or expiration of the stay, with respect to such claim."

3. To the extent that the petition for rehearing was ruled on subsequent to the filing of the staying bankruptcy petition, the affirming ruling may have constituted a technical violation of the

view of the June 2, 1995 order, this motion is lodged with the Court in an effort to resolve the ambiguity arising from the inadvertent issuance of the Third Circuit's June 2, 1995 order. Counsel represents to the court that they stayed request for rehearing will be withdrawn upon issuance of the anticipated order lifting the automatic stay.[4]

It is requested that the court affirm the applicability of tolling provisions of §108 of the bankruptcy code and also grant the request for an extension of time in which to file a petition for writ of certiorari.

As a direct result of the draconian sanctions order, Petitioner filed a Chapter 13 bankruptcy on May 23, 1995. Under the bankruptcy code, §108 and §362, all actions against the debtor are stayed. While the attorney will be the petitioner in this appeal, this

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stay which was then unknown to the Third Circuit. In any event, counsel does not seek to utilize the June 2, 1995 date of the circuit court's response to the request for rehearing. Thus, in effect, the pro forma affirmation of the April 27, 1995 decision can be treated as a nullity for purposes of this analysis. In the alternative, should this Court view the June 2, 1995 order as viable, the stay would run from the June 2, 1995 date for an entire 90 day period.

4. In addition, since August 14, 1995, counsel has been on medication and under doctor's care for strep throat. This ongoing, temporary condition has independently precluded the lodging of this motion and work on the underlying petition for certiorari.

action is still considered an action against him. Petitioner's bankruptcy counsel has applied for relief from the bankruptcy stay. This application is pending. However, for the reasons stated above counsel is moving this court under Rule 13.6 for an order confirming the effect of the bankruptcy stay upon the certiorari practices of this Honorable Court. (Attached hereto is a proposed order.)

Respectfully submitted,

/s/

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